STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2003
v	No. 233958 Macomb Circuit Court
JERRY ALAN CORNETT, Defendant-Appellant.	LC No. 00-003137-FH

Before: Saad, P.J., and Zahra and Schuette, JJ

PER CURIAM.

Defendant appeals as of right from his conviction of third-degree criminal sexual conduct, MCL 750.520d. For this conviction, defendant was sentenced to 38 to 180 months' incarceration. We affirm both his conviction and his sentence.

I. Facts and Procedural History

This case involves an allegation that defendant, a Clinton Township police officer, sexually assaulted the victim. In July 2000, several members of the Clinton Township police department, including defendant, were called to the victim's home on a domestic violence call. As a result of this call, the victim was required to appear in court to face criminal charges stemming from this occurrence. While at court, the victim again encountered defendant, who eventually gave her his personal pager number and told her to call him if she had any problems. Several weeks later, the victim paged defendant, who went to her house in the early morning hours of August 7, 2000. It is undisputed that the two had sexual intercourse at that time; defendant says it was consensual, the victim says it was involuntary. As a result, defendant was charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(c); one count of second-degree criminal sexual conduct, MCL 750.520c(1)(c); one count of attempted first-degree criminal sexual conduct; and home invasion, MCL 750.110a. Defendant's initial trial resulted in a hung jury. Defendant was retried, and convicted of only one count of third-degree criminal sexual conduct.

II. Analysis

A. Admissibility of Evidence

Defendant agues that he was denied a fair trial because he was prevented from offering evidence that the victim had (1) falsely accused her ex-boyfriend, John Hinz, of sexually assaulting her in the past, and (2) threatened to falsely accuse him of sexual assault. The trial court excluded the evidence because it found that insufficient foundation had been laid for the admission of the alleged false accusation of rape and threats. The trial court stated that this testimony would confuse the jury and would complicate and confuse the issues. The trial court heard arguments regarding the applicability of the rape-shield statute [MCL 750.520j[1]] but the court did not use the rape shield statute to exclude this testimony.[2] The trial court stated:

> The Court finds that an insufficient foundation has been laid for the admission of the alleged false allegation of rape and finds that it would be highly confusing to the jury to allow it in, would complicate the issues and confuse the issues as opposed to aluminating (sic) the issue that were (sic) faced with in this trial.
>
> I add that this is a difficult issue given the position of the rape shield statute, the right of confrontation and the general rules of cross examination.
>
> But I believe that the introduction of such evidence will not aluminate (sic) the issues, will not help the jury in deciding this case.
>
> And their (sic) being no foundation no adequate foundation laid for the introduction of such testimony the Court is going to disallow the testimony.

The trial court has wide discretion whether to admit or exclude evidence and will not be reversed on appeal absent an abuse of that discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists when an unprejudiced person, considering the

[1] MCL 750.520j provides, in part:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

[2] The rape shield statute does not apply to this situation because the victim's past sexual conduct is not at issue. The victim testified at the first trial that she never accused Hinz of raping her. Hinz claims that she did accuse him of raping her. The victim does not assert that Hinz raped her. Either the victim made a false accusation of rape, as Hinz asserts, or the victim made no accusation of rape as she asserts. Thus, this testimony has bearing only on her credibility and not on her past sexual conduct.

facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

Defendant sought to introduce this testimony as a means of attacking the victim's credibility. Such questioning may be permitted during cross-examination under MRE 608(b)[3]. However, a party who seeks to question a witness about specific instances of conduct under MRE 608 must establish a proper foundation for the testimony. *People v Adams*, 122 Mich App 759, 765; 333 NW2d 538 (1983), remanded 417 Mich 1073 (1983), remand order amended 419 Mich 913 (1984), rev'd 421 Mich 865 (1985).[4] Here, it appears that the trial court correctly concluded that defendant failed to establish a proper foundation for the proposed line of questioning because there was no independent evidence that the victim made false charges of sexual assault or threatened to do so. Although defendant planned to call Hinz to testify, no other evidence was proffered. Defendant was either unable or unwilling to call any of the police officers who may have handled these claims to testify that they were false, or that they were even made. Moreover, defendant did not attempt to offer any records of these accusations, though the prosecutor acknowledged having one police report. In short, defendant did not plan to offer any additional evidence to corroborate Hinz's proposed testimony.

Defendant also asserts on appeal that evidence that the victim had falsely accused Hinz of sexual assault (and that she had threatened to falsely accuse him of sexual assault) was admissible under MRE 404(b) and MRE 613(a) and (b). However, defendant failed to argue that the testimony was admissible under MRE 404(b) or MRE 613(a) or (b) on the record below or in his brief in response to plaintiff's motion to preclude that testimony. Generally, an issue is not properly preserved if it is not raised before and addressed by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However, a criminal defendant may obtain relief based upon an unpreserved error if the error is plain and affected defendant's substantial rights. Accordingly, we must determine if the ruling resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MRE 404(b) governs admission of evidence of "bad acts." It provides:

---

[3] MRE 608(b) provides in relevant part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility other than conviction of a crimes as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

[4] The Supreme Court reversed this Court's decision without explanation. This Court originally determined that there was no foundation for certain questions posed. It appears that, after the case was remanded by the Supreme Court for an evidentiary hearing, the Court found that there was a factual basis for the questions posed in the case.

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The rule is not limited to a criminal defendant's acts. It includes the acts of any person. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). By its terms, MRE 404(b) applies to the admissibility of evidence of other acts of "a person"; it does not specifically refer to criminal defendants. *Id.* at 410. MRE 404(b) applies to the admissibility of evidence of other acts of *any* person, such as a defendant, a plaintiff, or a witness. *Id*.

To be admissible under MRE 404(b), "bad acts" evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). The proffered evidence would be unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, the lack of foundation in support of the proposed testimony indicates that Hinz's testimony is marginally probative.

Furthermore, the determination as to whether the probative value of the evidence was substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). Here, the trial court determined that this testimony would be highly confusing to the jury and would complicate and confuse rather than illuminate the issues. Although the trial court did not analyze this issue under MRE 404(b), this evidence was properly excluded because its probative value was substantially outweighed by its potential for unfair prejudice. The trial court's exclusion of this evidence did not constitute plain error affecting defendant's substantial rights. *Carines, supra*, at 750.

Defendant also asserts that the testimony should have been permitted pursuant to MRE 613, which provides:

> (a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness.
>
> (b) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

MRE 613(a) does not apply because this section of the rule pertains to "a prior statement made by *the witness*." Here, the proposed testimony is of a prior statement made by the victim, and not by the proposed witness.

MRE 613(b) does not allow for the admission of extrinsic evidence for the purpose of impeachment of a witness on collateral matters. However, extrinsic evidence of impeachment regarding the following does *not* qualify as collateral: (1) matters closely bearing on a defendant's guilt or innocence and (2) a witness' bias, interest, or opportunity for knowledge. *People v LeBlanc*, 465 Mich 575, 589-590; 640 NW2d 246 (2002). Here, even if the trial court should have admitted Hinz's testimony pursuant to MRE 613(b) as evidence of the victim's interest or bias, the exclusion of this evidence did not affect defendant's substantial rights *Carines, supra*, at 750.

Here, defense counsel questioned the victim extensively about her alleged statements to Hinz, including her alleged threats to accuse him of rape. Although the victim denied making such statements, the jury did have the opportunity to hear them during cross examination of the victim. Thus, the implication to the jury was that someone had asserted that the victim made these statements. Defendant did not plan to offer any additional evidence, aside from Hinz's testimony, that the statements were ever made. Therefore, Hinz's testimony would not have provided the jury with much additional information on the matter of the victim's bias or interest. In sum, we conclude that any testimony that Hinz could have provided with regard to these statements would not have affected the outcome of the proceedings, and it neither resulted in the conviction of an innocent person nor seriously affected the fairness, integrity or public reputation of the proceedings. *Carines, supra*, at 750.

B. Admissibility of Police Rules Manual

Defendant also argues that the trial court erred in admitting the Clinton Township Police Rules Manual. The relevant rule provides that a police officer should not have visited the victim's home.[5] Defendant maintains that the admission of this evidence was erroneous because whether he violated a departmental rule was irrelevant to the crime with which he was charged. We disagree.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402, *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any

---

[5] The prosecution had Police Captain Mills read Rule 8.17 from the police manual:

> Members shall avoid regular or continuous association or dealings with person whom they know are under criminal investigation or indictment or have a reputation of [sic, in?] the community or the department for present involvement in felonious criminal behavior accept [sic] as necessary to the performance of official duties or were [sic, where?] unavoidable because the persons [sic] a member of the immediate family.

It was undisputed that the victim had been charged with domestic violence at the time of the assault.

tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

Our Supreme Court, in *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996), citing *People v Mills*, 450 Mich 61, 67-68; 5637 NW2d 909 (1995), repeated the test for relevance. There, the Court noted that relevancy is a two-part test, in which a court should look for both materiality and the probative force of the evidence. *Id.* According to *Brooks*, evidence is material if it is related to a fact that is of consequence to the case and probative if it helps make a material fact more or less probable than it would be without the evidence. *Id.*

Here, defendant was initially charged with, among other things, home invasion and first-degree criminal sexual conduct. The prosecution's theory of the case, as outlined in its opening argument, was that defendant, a police officer, got off work, went to a bar and then decided to go to the victim's house to have sexual intercourse. The prosecution presented evidence that defendant broke into the victim's house by breaking through a screen door. If defendant broke his way into the house in order to force the victim to have sexual intercourse with him, the prosecution could introduce evidence to dispel the argument that defendant was acting in his capacity as a police officer when he went to the victim's house.

The question of defendant's purpose for being at the victim's house is a material issue to the prosecution's case. Police officers are forbidden from associating with people under investigation and it is less likely that defendant was acting as a police officer when he went to the victim's house, and more likely that he was there for his own purposes. Accordingly, this evidence, the Police Rules Manual, is relevant.

C. Late Endorsement of Prosecutorial Witness

Further, defendant contends that the trial court erred in permitting Officer Vanslambrouck to testify when she had only been endorsed as a witness two days earlier. A trial court's decision to allow a late endorsement is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992), citing *People v Heard*, 178 Mich App 692, 696; 444 NW2d 542 (1989).

Pursuant to MCL 767.40a(4), "[t]he prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." If this statute is violated, the defendant must show prejudice from the violation before he is entitled to relief. *People v Hana*, 447 Mich 325, 358 n 10; 524 NW2d 682 (1994). Here, the trial court believed the prosecutor's explanation that she endorsed this witness late in the proceeding only because she had discovered this witness just days earlier. In his brief, defendant fails to set forth any facts or argument, other than speculation, that the prosecution's explanation was untrue and also fails to show any unfair prejudice by the late endorsement of this witness.

D. Non-Party Addressing the Court at Sentencing

Defendant also objects to the trial court's decision to allow Virginia Bjur to speak at his sentencing hearing.[6] The court's decision to allow a non-party to address the court at sentencing is reviewed for an abuse of discretion. *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994).

Bjur, who claimed that defendant also sexually assaulted her, was barred from testifying at trial. At the sentencing hearing, Bjur's only comment to the court was, "I just wanted to say as a police officer that took an oath not to break the law he did and should receive the maximum penalty."

In *Albert*, *supra* at 74-75, this Court reviewed a defendant's claim that the trial court improperly permitted an attorney who represented one of the victims to address the court. The attorney sought a forensic examination of the defendant to show that defendant was a pedophile. *Id.* at 74. This Court noted that "although [the attorney] did not constitute a 'victim' as defined in the Crime Victim's Rights Act" the trial court did not abuse its discretion in permitting him to speak because the Court could not perceive any "bias or prejudice on the part of the sentencing court as a result of [the attorney's] statements.' *Id.* at 74-75.

Here, the prosecutor argues that, under the Crime Victim's Rights Act, MCL 780.765, Bjur has a right to appear and make a statement at defendant's sentencing.

We need not decide if Bjur is a victim under the act because defendant has failed to show any prejudice by Bjur's comment. Defendant's argument merely includes the conclusory statement that Bjur's comments were prejudicial; we are unable to discern what effect, if any, Bjur's comments may have had upon the trial court. In *People v McAllister*, 241 Mich App 466, 476; 6161 NW2d 203 (2000), this Court recognized the limited role victim impact statements may have upon a trial court during sentencing. Defendant has not shown any prejudice by Bjur's lone statement; thus, we reject defendant's argument that he should be resentenced.

E. Accuracy of the Presentence Investigation Report

Defendant also objects to the trial court's decision not to delete a particular statement made by a probation officer which appears in his presentence report. Both the relevant statute, MCL 771.14(6), and the applicable court rule, MCR 6.425, relate to correcting inaccuracies. However, here, defendant fails to show how the probation officer's comment was inaccurate. Essentially, the officer stated his belief that defendant was being dishonest about the circumstances of the sexual encounter, a conclusion with which the jury apparently agreed. Because defendant fails to show any inaccurate material in his presentence report, we decline his request for resentencing.

F. Scoring Under Sentencing Guidelines

Finally, defendant takes issue with the trial court's scoring of two offense variables, OV 10 and OV 12. According to *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994), a

[6] Bjur's name is spelled various ways in the lower court files. We use the spelling used by the trial court, "Bjur."

trial court's scoring will not be reversed if evidence exists to support the score. Under OV 10, defendant was scored 15 points for predatory conduct. MCL 777.40(d)(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." Defendant maintains that there was no evidence of predatory conduct on his part. We disagree. The record shows that defendant engaged in concerted conduct toward the victim to gain her trust and ultimately, to sexually assault her. Defendant approached the victim when she was at court on a criminal charge, a charge defendant knew about because he was one of the investigating officers on the case. Defendant saw the victim driving from the court and signaled her to a parking lot, where he asked her questions regarding the charges against her. Defendant then gave her his pager number and indicated that he would be willing to "help her" if she needed any assistance in her case. On the day of the charged events, defendant was seen outside her house in a marked police car and full uniform; when she paged him, he did not immediately respond to her call, but waited until after work to respond. The trial court had evidence before it from which it could conclude that defendant pursued a relationship with the victim for the purpose of sexual intercourse.

Similarly, defendant's challenge to his scoring of one point under OV 12 for a contemporaneous felonious criminal act is without merit. The thrust of defendant's argument is that, because he was acquitted of home invasion, the trial court could not have concluded that he also committed a contemporaneous felony. However, the trial court is permitted to look at charges of which defendant was acquitted. See, e.g., *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998), citing *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997), and *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette